STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 3, 2011
v	No. 295845 Kent Circuit Court
MARCUS SHELDON BARNETT, Defendant-Appellant.	LC Nos. 09-000469-FH 09-000470-FH

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of three counts of interfering with a witness in a criminal case for which the maximum term of imprisonment for the violation is more than ten years, or for which the violation is punishable by imprisonment for life or any terms of years, MCL 750.122(6); MCL 750.122(7)(b). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to consecutive prison terms of 60 months to 20 years. Defendant appeals as of right. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On September 14, 2008, defendant was charged in an unrelated matter with first-degree home invasion arising from an incident that occurred on September 13, 2008, at the home of Meagan Russow. A preliminary examination with regard to that charge was scheduled for September 22, 2008. On September 21, 2008, defendant, who was being held at the Kent County Correctional Facility, engaged in a recorded telephone conversation with his girlfriend, Dezari Munjoy.[1] During that conversation, defendant informed Munjoy that he would "be okay if that chick don't show up tomorrow, babe. You know that?" Defendant asked Munjoy to make a three-way call to Russow. After Munjoy placed the call, defendant left the following message on Russow's answering machine:

[1] Munjoy was at home during this telephone conversation.

> Hello Meagan. Hey this is me. I'm in jail. I'm calling you on the three-way. Check this out. Do not show up for court. And don't tell everybody my business. Don't advertise this shit. Do not show up for court. You don't show up, they don't have no case, they going to throw it out. So do not pull up with that damn blue car, and f___ing advertise and come up there. Do not show up for court. Do not attempt to be there. Go to work. Go to wherever you gotta go. Do not be around. They cannot hurt you if you not around. Just go on to work. Do not show up. You show up, I'm going to prison. And I aint' trying to go there. Today is my son's birthday, 9-21-98. Thank you. I'm in jail for you. Do not show up for court. Bye.

After the three-way call ended, defendant said to Munjoy:

> I'm running my prelim. They ain't got no evidence. And ain't no mother f___er gonna be there court. I'm coming home. Bam. You make sure a press it, and keep it on. You keep that on, you keep that on there. You do what I ask you to do. That's all you need to do. . . . I need you to do this for me. . . . I'm telling you what I need you to do from inside. I'm telling you what I need you to do. Even if you have to sit outside in that f___ing court room, outside at f___in Kentwood, you see that f___in broad pull up, you tell her to go, no, do not show up. . . . This is my life. I'm trying not to make sure the bitch show up. You trying to scare the mother f___er off and, and some brut shit. Your ass is gonna get me f___ed up because she gonna press the situation. And I'm gonna be penalized again. Listen to me. She cannot show up. That's all I'm telling you.

Munjoy attended the September 22, 2008, preliminary examination, but Russow did not appear. Because of Russow's failure to appear, the trial court rescheduled the preliminary examination for September 29, 2008.

A second recorded telephone conversation took place between defendant and Russow while Russow was visiting defendant at the correctional facility on September 24, 2008. During this conversation, defendant told Russow:

> Listen. Now listen to this. My mamma told me to tell you this. You don't be at your house, go to work, be away. As long as they don't put nothing from my hand, from their hand, nothing, the case, no good. I can chill till Monday, the 29th. If they don't serve you nothing from now until the 21st, you go away from your house, Castle Bluff, be gone. . . . Without you, listen, listen, plaintiff, defendant, without you, there's no case.

Defendant also accused Russow of having sexual relations with another man named Nicholas. Additionally, defendant accused Russow of lying to the police about the home invasion charges and told her that

> You can't go to court. Because you'll be caught for lying. Because they probably will, will go up to your job and find you and make you go to court, and then get you for perjury for lying like I have. . . . So please listen to me. Court is

> Monday, do you know that? . . . They postponed my court date to Monday, the 29th, at 1. Be gone. Feel me. I will love you to death.

Defendant again accused Russow of being a liar and instructed her to

> [W]rite me a letter today, saying you apologize for lying about the keys, lying about I don't live there, lying about I'm homeless, put that and make me something I can read. Right when you get up get out of here, go somewhere, don't go to twenty, don't' go to, don't go there. Listen to me, you got, if you do go over there, check the mail, I've got a letter, so you can read it. Beyond that, don't be around there, because if they give you paperwork, it would be, a subpoena is nothing without giving it to you. It don't come in the mailbox. So don't worry about that. But if they see you . . . If it don't go from theirs to yours, don't worry about it. Out of sight out of mind. Do you hear me? That's all you gotta worry about. I will love you for that. Because they already, last week is gone. This week, you not there, they don't come, there's no case. You know Anna Nicole, no, no, no um, no, Nicole Simpson Smith, no OJ Simpson. If she come, see what I'm saying? It takes two to tango. It takes two, Nicholas and you. See, without him . . . Without him it wouldn't have been no problem

Russow did not appear for the rescheduled preliminary examination of September 29, 2008, and the home invasion charge against defendant was eventually dismissed.

The prosecutor later filed new criminal information charging defendant with three counts of witness tempering under MCL 755.122(6), which provides that:

> A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or official proceeding.

At trial, the primary evidence against defendant consisted of the two recorded telephone conversations. The jury found defendant guilty on all three counts.

II. MCL 750.122(6) and *People v Greene*[2]

The witness tampering statute, MCL 750.122, identifies "four different categories of witness tempering: bribery (subsection 1), threats or intimidation (subsection 3), interference (subsection 6), and retaliation (subsection 8)." *Greene*, 255 Mich App at 624. To prove that a defendant has violated MCL 750.122(6), the prosecutor must establish that the defendant

[2] *People v Greene*, 255 Mich App 426; 661 NW2d 616(2003).

> (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In this last part of the definition, we use the word interference to include all types of conduct proscribed in subsection 6. [*Greene*, 255 Mich App at 442-443.]

"As long as the interference does not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, any act or attempt to impair the witness's capacity to attend, testify, or provide information in or for a present or future official proceeding violates subsection 6." *Greene*, 255 Mich App at 441. The Court in *Greene* concluded that the evidence in that case was sufficient in that case to create a question of fact with regard to whether the defendant's appeals to a witness to not attend the preliminary examination "constituted interference." *Id*. at 446.

Defendant does not argue that the evidence was insufficient to support his convictions. Rather, he argues that this Court in *Greene* erroneously interpreted MCL 750.122(6) to include statements that are not bribes, intimidation, or threats because such an interpretation is inconsistent with the common law offense of obstruction of justice. Inherent in this argument is the premise that MCL 750.122 codified the common law offense of obstruction of justice. However, as this Court noted in *Greene*, 255 Mich App at 438, "the precise statutory description of the prohibited criminal conduct, not necessarily notions of witness tampering that existed at common law, under other statutes, or even under other subsections of MCL 750.122, guides our interpretation [of MCL 750.122(6)]. The Court also stated:

> This Court, in *People v Milstead*, 250 Mich App 391, 406 n 9; 648 NW2d 648 (2002), and *People v Sexton*, 250 Mich App 211, 224 n 5; 646 NW2d 875 (2002), recently noted that, in enacting MCL 750.122(6), the Legislature codified the common-law crime of obstruction of justice. Notably, that statement was obiter dictum, and therefore lacks the force of law because the statute was not at issue in *Milstead* or *Sexton*, which were related cases. See *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001). Additionally, we are not persuaded that, contrary to the plain language in the statute but as Greene argues, MCL 750.122(6) follows any common-law approach to obstruction of justice that would require threats, intimidation, or physical interference as elements of this offense. [*Greene*, 255 Mich App at 438 n 6.]

Language set forth in a footnote of an opinion can constitute binding precedent if the language creates a rule of law and is not merely dictum. MCR 7.215(J)(1). The language in the *Greene* footnote was not dictum; rather, the footnote addressed an argument raised by the defendant regarding the applicability of MCL 750.122(6) and was, therefore, necessary to the disposition of the case. Thus, the language in the footnote constituted a rule of law. We note, nonetheless, that we agree with the analysis in the footnote.

III. THE CONSTITUTIONALITY OF MCL 750.122(6)

Defendant argues that MCL 750.122(6) is unconstitutionally overbroad and vague. Specifically, he asserts that the statute is unconstitutionally vague and overbroad and that it infringes upon protected speech; i.e., his legal right to prevent Russow from testifying at his preliminary examination because he did not want her to commit perjury. Whether a statute is constitutional is a question of law that this Court reviews de novo. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

A statute is accorded a strong presumption of validity and this Court has a duty to construe it as valid absent a clear showing of unconstitutionality. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). As this Court stated in *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998):

> A penal statute is unconstitutionally vague if (1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) its coverage is overly broad and impinges on First Amendment Freedoms.

In order to pass constitutional muster and give fair notice, "a penal statute must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement'" *People v Lino*, 447 Mich 567, 575-576; 572 NW2d 434 (1994), quoting *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855; 75 L.Ed.2d 903 (1983); *People v White*, 212 Mich App 298, 312; 536 NW2d 876 (1995). The statute cannot use terms that require persons of ordinary intelligence to guess at its meaning and differ regarding its application. *Id*.; *People v Perez-DeLeon*, 224 Mich App 43, 46; 568 NW2d 324 (1997). A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. *Vronko, supra* at 653.

The overbreadth doctrine is primarily applied to First Amendment cases where a statute prohibits constitutionally protected conduct. *Jenson (On Remand), supra*. "The overbreadth of a statute must be real and substantial; it must be judged in relation to the legitimate sweep of the statute where conduct and not merely speech is involved." *Id*.

It is not plainly apparent that MCL 750.122(6) is vague or unconstitutionally overbroad. The statute at issue deters a person from tempering with a witness. Specifically, MCL 750.122(6) deters a person from *willfully* impeding, interfering with, preventing, or obstructing a witness's ability to attend, testify, or provide information for a present or future official proceeding. "Willful" and "impede," "interfere" "prevent" and "obstruct" are sufficiently specific terms with commonly understood meanings such that enforcement of the statute will not be arbitrary or discriminatory. Further, because the statute requires that a defendant willfully impede, interfere, prevent, or obstruct a witness's ability to attend, testify, or provide information for a present or future official proceeding, the conduct prohibited is clearly stated. Defendant has not established that the statute is unconstitutionally vague.

Nor has defendant established that the statute is unconstitutionally overbroad as applied to his conduct. The statute prohibits conduct in the form of acts which impede, interfere with, prevent, or obstruct a witness's ability to attend, testify, or provide in or for a present or future official proceeding. It is not plainly apparent that the statute infringes upon protected conduct, or that defendant's particular conduct was constitutionally protected. From the evidence presented at trial, defendant told Russow not to show up for the preliminary examination and not to testify. He told her to avoid service of the subpoena. He also told Munjoy to be at the courthouse and to deter Russow from appearing in court if she showed up. This conduct is clearly prohibited by the explicit terms of MCL 750.122(6). The statute is neither unconstitutionally vague nor overbroad as to violate any free speech protections.[3]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

[3] If the true purpose of defendant's statements was to prevent Russow from committing perjury as he purports, he could have simply instructed Russow to tell the truth during the preliminary examination.